



**Testimony of Scott Amey, General Counsel
Project On Government Oversight
before the Committee on Homeland Security's
Subcommittee on Oversight, Investigations, and Management**

**"Homeland Security Contracting: Does the Department
Effectively Leverage Emerging Technologies?"**

I want to thank Chairman McCaul, Ranking Member Keating, and the Subcommittee for asking the Project On Government Oversight (POGO)¹ to testify about issues related to Department of Homeland Security contracting. I am Scott Amey, POGO's General Counsel.

Throughout its thirty-year history, POGO has created a niche in investigating, exposing, and helping to remedy waste, fraud, and abuse in government contract spending. We have supported many reforms that enhance competition, accountability, and oversight. Additionally, we have voiced concerns about contracting vehicles that often place taxpayer funds at risk, including cost-reimbursable, time and material, and labor hour contracts, as well as "other transaction authority."² Many acquisition reforms were imposed prior to the large increase in federal contract spending (which exceeded \$537 billion in fiscal year 2010), consolidation in the contractor community, the large-scale hiring of contractors to perform government services, and increased demands on the acquisition workforce to do more with less, which has led to waste, fraud, and abuse. Fallout from the War on Terror and Hurricane Katrina also highlight how drastically different the federal government's contracting landscape is now from what it was in past years.

DHS's mission is to prevent terrorist attacks in the U.S., reduce America's vulnerability to terrorism, and minimize damage from terrorism and natural disasters. To fulfill this mission, DHS has a vast organizational mandate that ranges from protecting the President (U.S. Secret Service), to protecting our oceans (U.S. Coast Guard), to protecting our borders (Customs & Border Protection and Immigration & Customs Enforcement), to protecting our airports (Transportation Security Administration), and to helping every town, city, county, and state in relief, recovery, and reconstruction efforts (Federal Emergency Management Agency). As a

¹ Founded in 1981, POGO is a nonpartisan independent watchdog that champions good government reforms. POGO's investigations into corruption, misconduct, and conflicts of interest achieve a more effective, accountable, open, and ethical federal government. For more information about POGO, please visit www.pogo.org.

² The Federal Acquisition Streamlining Act of 1994 (FASA) (Public Law 103-355), the Federal Acquisition Reform Act of 1996 (FARA) (Public Law 104-106), the Services Acquisition Reform Act of 2003 (SARA) (Public Law 108-136), and 10 U.S.C. §2371 have removed taxpayer protections.

result, DHS has to be on the cutting edge of new technologies and services to stay at least one step ahead of threats to our nation. Yet, it still must protect taxpayers and spend money wisely.

How DHS is Buying

According to federal contract data, the Department of Homeland Security spent \$13.6 billion in contracts in FY 2010.³ That total is less than the agency's peak contract spending total of \$16.5 billion in FY 2006.

DHS spent \$3.2 billion on goods and more than \$10 billion on services in FY 2010. For the most part, the agency has awarded contracts under competitive procedures—according to federal data, approximately 85 percent of DHS contract dollars (and 74 percent of contract transactions) were awarded through competitive procedures. These numbers have dramatically improved since 2006 when DHS was awarding genuinely competitive contracts less than 60 percent of the time.

Data on the type of contracts utilized is more difficult to analyze, as much of that data is incomplete. That said, it appears that DHS used fixed price contracts for over \$7 billion worth of contracts in FY 2010. The data further indicate that nearly \$4 billion was spent using riskier types of cost-reimbursement and time and material contracts that are prone to waste, fraud, and abuse, and should be carefully watched.

“Other transaction authority” (OTA) is another risky procurement vehicle that should be a concern to this Subcommittee, especially since that authority is set to expire on September 30, 2011.⁴ Other transaction authority is a term commonly used to refer to the authority to enter into other transactions (OT) agreements other than contracts, grants or cooperative agreements. OT agreements are customized agreements rather than contracts that can be specifically tailored based on the government's needs. The intent was to lure leading-edge non-traditional companies that were not doing business with the government.⁵ The inherent problem, however, is that rather than the government controlling what it needs, the OT contractors are placed in the powerful position of saying “here's what we will do for you.”

Other transactions generally are not subject to the federal laws and regulations governing procurement contracts. Therefore, OTA is exempt from the usual contracting controls and oversight mechanisms in contracting statutes, the Federal Acquisition Regulation (FAR) (in

³ All contracting figures were compiled using USAspending.gov unless stated otherwise.

⁴ Department of Defense and Full-Year Continuing Appropriations Act, 2011 (Pub. Law 112-10), Section 1651, April 15, 2011. In 2002, DHS received OTA for research and development prototype projects. Homeland Security Act of 2002 (Pub. Law 107-296), Section 831, November 25, 2002. The Homeland Security Act refers to the authority that the Secretary may exercise to carry out research and development projects and prototype projects under 10 U.S.C. §2371 and the National Defense Authorization Act for Fiscal Year 1994 (Public Law 103-160), Section 845, November 30, 1993. The authority, initially granted for 5 years, has been extended each year, but sunset on September 30, 2011. 6 U.S.C 391(a). The Transportation Security Administration also has authority to enter OT agreements. Aviation and Transportation Act, (Pub. Law 107-71), Section 101, November 19, 2001; 49 U.S.C. § 106(l)(6).

⁵ Congressional Research Service, “Other Transaction (OT) Authority,” January 27, 2010, pp. 23-25. http://assets.opencrs.com/rpts/RL34760_20100127.pdf (Downloaded July 14, 2011) (Hereinafter Other Transaction (OT) Authority).

particular Truth in Negotiations Act regulations and Cost Accounting Standards), government audits, and Small Business Act requirements for small business participation.⁶

The Congressional Research Service has voiced several concerns about the use of OTs:

The nature of other transaction authority contributes to the challenge of evaluating OTs. Freed from adhering to the FAR and certain procurement statutes, an agency can tailor an OT to the needs and circumstances of a particular project and the participants, which means the usual methods or vehicles for monitoring contractor performance—such as contract administration and audit services (Part 42 of the FAR) and quality assurance (Part 46 of the FAR)—are not required. Additionally, aside from counting the number of traditional contractors, it is unclear what features of other transactions can be readily measured or evaluated....[I]t is particularly challenging to evaluate the benefits of OTs.⁷

Unlike DoD, which had struggled to lure non-traditional contractors,⁸ DHS has been successful in doing so. In 2008, GAO found that nontraditional contractors, including small businesses and contractors that had not recently worked for the government, were involved in 83 percent of the other transaction agreements GAO reviewed.⁹ Despite this encouraging benchmark, however, GAO uncovered several problems:

- DHS did not have all the information it needed to determine whether other transaction agreements were successful or that their benefits outweighed their risks.
- DHS was not able to accurately assess whether it was using other transaction agreements to effectively negotiate intellectual property and data rights.
- DHS could not assure successful outcomes due to inadequate staffing levels and high turnover in its contracting workforce.
- DHS lacked the resources, in terms of knowledge and workforce capacity, to maximize the benefits and ensure the transparency of other transaction agreements.¹⁰

DHS appears to have significantly reduced its use of and dollars spent on OT agreements,¹¹ but those agreements still deserve to be reviewed and audited. Due to the inherent risk of OT

⁶ Other Transaction (OT) Authority, pp. 18-22.

⁷ Other Transaction (OT) Authority, pp. 22-23.

⁸ Other Transaction (OT) Authority, pp. 23-24; 72% of the research and 97% of the prototype DoD OTA funding went to traditional contractors in the late-1990s. Testimony of Donald Mancuso, Deputy Inspector General Department of Defense, before the Subcommittee on Readiness and Management Support of the Senate Committee on Armed Services on Defense Acquisition, April 26, 2000, p. 15. <http://www.dodig.mil/audit/reports/fy00/00-118.pdf> (Downloaded July 14, 2011)

⁹ GAO “identified a total of 50 nontraditional contractors who participated in 44 (83 percent) of the agreements [it] examined, with multiple nontraditional contractors involved on 8 agreements. Half of these contractors had not recently worked for the government.” Government Accountability Office, “Department of Homeland Security: Improvements Could Further Enhance Ability to Acquire Innovative Technologies Using Other Transaction Authority,” GAO-08-1088, September 23, 2008, p. 7. <http://www.gao.gov/new.items/d081088.pdf> (hereinafter GAO-08-1088)

¹⁰ GAO-08-1088, pp. 12-16.

¹¹ Government Accountability Office, Statement of John K. Needham, Acting Director, Acquisition and Sourcing Management, before the Subcommittee on Emerging Threats, Cybersecurity, and Science and Technology, House

acquisitions and the lack of reporting by DHS and GAO,¹² this Subcommittee should consider the extent to which DHS's OTA should be extended, request information about the OT agreement requirements and deliverables, and ask the agency about OT programs that can be immediately converted to FAR-based contracts.

What DHS is Buying

More to the point of today's hearing is whether DHS is effectively leveraging emerging technologies. From a contracting perspective, this is a difficult question to answer. DHS certainly bought new technologies, but how much safer are we?

Many years ago, I testified before the full Homeland Security Committee and stated that DHS was buying infant technologies that were unproven and sometimes provided little or no benefit to the agency. We are still paying the price for poor policies and decisions resulting from the Deepwater and SBInet programs. It was one thing for those programs to fail while in their infancy, but it is another for those and other troubled programs to do so ten years later. Any questions about DHS's effectiveness might only be answered if and when the next natural disaster or terrorist attack take place.

Additionally, DHS's reliance on service contractors also makes it difficult to quantify the effectiveness of its buying because we are paying for time rather than tangible goods. As often is the case with service contracts, they are hard to measure and evaluate. For example, in March 2009, DHS Secretary Janet Napolitano instituted an efficiency review "expected to lead to hundreds of millions of dollars in cost avoidance."¹³ That review included "launching efforts to reduce the Department's reliance on contractors and contract services to strengthen our Federal workforce."¹⁴ Simply stated, DHS wanted to know more about the services it was procuring and the cost of those services. Unfortunately, DHS's estimate of the number of its service contractor employees was off by 100,000,¹⁵ and I have not heard about any DHS efforts to streamline, reduce, or cut services that are not needed or that were or are wasting taxpayer dollars.

Committee on Homeland Security, "Department Of Homeland Security: Status and Accountability Challenges Associated with the Use of Special DHS Acquisition Authority," GAO-08-471T, February 7, 2008, p. 6. <http://www.gao.gov/new.items/d08471t.pdf>

¹² Homeland Security Act of 2002 (Pub. Law 107-296), Section 831(b), November 25, 2002. GAO is required by statute to report to Congress on DHS's ability to lure non-traditional contractors, results of OT acquisitions, and whether safeguards are needed. The last report issued by GAO was in 2008. GAO-08-1088.

¹³ Department of Homeland Security, Office of the Press Secretary, "Secretary Napolitano Rolls out DHS Efficiency Review Initiative," March 27, 2009. http://www.dhs.gov/ynews/releases/pr_1238172270388.shtm (Downloaded July 14, 2011).

¹⁴ Department of Homeland Security, Office of the Press Secretary, "Secretary Napolitano Announces Two New Efficiency Review Initiatives," April 7, 2010. http://www.dhs.gov/ynews/releases/pr_1270667336512.shtm (Downloaded July 14, 2011); DHS contractors Any review of DHS service contractors might have been based on the error.

¹⁵ The DHS has begun to keep statistics on the size of its shadow government workforce of contractor employees. It had estimated that the size of its contractor employee workforce was 200,000, as compared with 188,000 DHS employees, but recently changed the estimate to 110,000 contractor employees. Ed O'Keefe, "Eye Opener: Homeland Security Has More Contractors Than Feds," *The Washington Post*, February 24, 2010. http://voices.washingtonpost.com/federal-eye/2010/02/eye_opener_homeland_security_h.html (Downloaded September 27, 2010); Sean Reilly, "Whoops: Estimate on number of DHS contract employees off by 100,000 or so," *Federal Times*, April 11, 2011. <http://blogs.federaltimes.com/federal-times-blog/2011/04/11/whoops-estimated-number-of-dhs-contract-employees-off-by-at-least-100000/> (Downloaded April 12, 2011)

Without more information and oversight, it is nearly impossible to determine if DHS is effectively leveraging new technologies that would protect the country from emerging threats—only time will tell.

Recommendations

POGO respectfully requests that this Subcommittee consider the following recommendations to improve DHS contracting:

1. Ensure that full and open competition is the rule, and restore the definition of “competitive bidding” to require at least two bidders.
2. Require that risky contract vehicles are used in limited circumstances and only when supported by proper justifications and oversight protections.
3. Review DHS commercial item and service acquisitions to ensure that a commercial marketplace exists.
4. Investigate how prime contractors bill the government at their own labor rate(s) rather than the rate they pay their subcontractors on Time and Material or Labor Hour (T&M/LH) contracts.
5. Confirm that contractors are not performing inherently governmental functions, which must be performed by civil servants.
6. Reestablish the taxpayer-protection checks and balances that have been removed from the contracting system, including requiring contractors to provide cost or pricing data to the government for all contracts except those where the actual goods or services being provided are sold in substantial quantities in the commercial marketplace, and restoring the Truth in Negotiations Act (which would result in enormous improvements in contract pricing, negotiation and accountability, and save taxpayers billions of dollars per year).
7. Review DHS’s use of the suspension and debarment system, especially as it has been applied to large contractors with repeated histories of misconduct.
8. Provide a fair playing field for all DHS contractors to ensure that all vendors are open to doing business with DHS.
9. Require copies of contracts and task and delivery orders to be made public on USAspending.gov.
10. Examine and improve the conflict of interest and ethics system to ensure that DHS employees comply with all federal conflict of interest laws and regulations.

11. Renegotiate OT agreements under FAR-based contracts (e.g., FAR Part 15) as soon as practicable.

Thank you for inviting me to testify today. I look forward to answering any questions and working with the Subcommittee to further explore how Department of Homeland Security contracting can be improved.



Scott H. Amey, General Counsel

Mr. Amey rejoined the POGO staff in 2003 and directs POGO's Contract Oversight investigations, including reviews of federal spending on goods and services, the responsibility of top federal contractors, and conflicts-of-interest and ethics concerns that have led to questionable contract awards. Mr. Amey has testified before Congress and federal agency panels, submitted public comments on proposed regulations, educated the public by working with the media, and authored reports, alerts, and blogs on contracting issues.

Mr. Amey previously worked at POGO in the mid-1990s as a Research Associate, and was one of the organization's most prolific investigators. One of his most notable projects during that time was an investigation into Area 51 that resulted in the Air Force admitting the black facility's existence and submitting to compliance with environmental laws. Mr. Amey also undertook investigations into Boston's Big Dig project and safety concerns at nuclear power plants. Mr. Amey left POGO in 1998 to attend law school, after which he clerked for the Honorable James A. Kenney, III, at the Court of Special Appeals of Maryland from 2001-2003. Mr. Amey received a J.D., magna cum laude, from the University of Baltimore School of Law in 2001, and a B.A. from the University of Pittsburgh in 1993. Mr. Amey is licensed to practice law in Maryland.